

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1694 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

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1. Whether Reporters of Local Papers may be allowed to see the judgement?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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JAYANTKUMAR J MAHIA

Versus

DISTRICT COLLECTOR

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Appearance:

MR IS SUPEHIA for Petitioner

MR SP HASURKAR ADDL.GP for Respondent Nos. 1 & 5

No one appears for respondent no.3 despite service of notice

MR TR MISHRA for Respondent No. 4

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CORAM : MR.JUSTICE M.R.CALLA

Date of Order: 26/11/98

ORAL JUDGMENT

This Special Civil Application involves a lis between the present petitioner and the respondent no.4, both claiming to be the members of the Scheduled Caste. The petitioner as well as the respondent no.4 are

employees of the Dabhoi Nagar Palika and the dispute is about the seniority as Octroi Clerk and for holding the higher post of Octroi Inspector in Dabhoi Nagar Palika.

2. There is no dispute about the factual position that the petitioner was initially appointed as an Octroi Clerk on 21.5.1981. He was holding the qualification of L.S.G.D. and, therefore, he is exempted from passing the departmental examination for the post of Octroi Clerk. The respondent no.4 was also appointed initially as an Octroi Clerk on 21.5.1981. These appointments as Octroi Clerk held by the petitioner as well as the respondent no.4 came to an end on 28th August 1981. The petitioner herein approached the Civil Court because he was not allowed to continue as Octroi Clerk and he sought an injunction from the Court in his favour for his continuance and continued to work as Octroi Clerk as he was working prior to 28th August 1981. While the injunction order granted in favour of the petitioner in Regular Civil Suit No.384 of 1981 pending in the Court of Civil Court (Junior Division), Dabhoi, as granted on 18th September 1981 was in force, Dabhoi Nagar Palika discharged the petitioner from service on 13th October 1981. The petitioner also filed an application for breach of injunction, but the Civil Judge (Junior Division) found that the hearing of the injunction application which was fixed on 12th October 1981 did not take place on that day nor the period of injunction was extended and taking advantage of this situation, Dabhoi Nagar Palika discharged the petitioner on 13th October 1981, although the petitioner claimed that the injunction order had been granted till the hearing of the suit or till further orders by the Court. Faced with such a situation, the petitioner approached this Court by way of Special Civil Application dated 22nd October 1981 being Special Civil Application No.4298 of 1981 and in this Special Civil Application, the notice returnable was issued for 5th November 1981 on 28th October 1981 and thereafter when the matter came up before the Court on 5th November 1981, a statement was made before the Court on behalf of the President of the Nagar Palika, Dabhoi that the petitioner will be appointed as a Clerk on temporary basis as others are appointed and on this statement being made, the learned Counsel for the petitioner withdrew the petition and also agreed to withdraw the Civil Suit pending in Dabhoi Court within a week. The Court disposed of the Special Civil Application as withdrawn and the notice was discharged. The facts relating to the Civil Suit etc. have been narrated on the basis of the record of the Special Civil Application No.4298 of 1981 which was called from the

Registry during the course of the hearing of this matter. After the above order dated 5th November 1981, an order was passed on 9th November 1981 giving appointment to the petitioner as Octroi Clerk by the Dabhoi Nagar Palika and in pursuance of this order dated 9th November 1981, the petitioner joined on 10th November 1981. In the meanwhile, the respondent no.4 was again appointed as Octroi Clerk on 1st September 1981 and the petitioner who had continued to work as Octroi Clerk on the strength of the injunction granted by the Civil Court till 12th October 1981 was again appointed on 9th November 1981. The respondent no.4 has also come with the case that he was also placed with the charge of Octroi Inspector with effect from 22nd April 1992 against the retirement of one permanent Octroi Inspector and continued to work as such upto 10th November 1996 and thereafter in pursuance of the Resolution No.85 dated 28th October 1996, from 20th November 1996 onwards. By way of narration of the facts, it may also be stated that the direct recruitment for the post of Octroi Inspector was held in the year 1991 at which the respondent no.4 had been selected. However, against that recruitment, the petitioner had also filed Civil Suit and in that Civil Suit, an injunction order had been passed and on account of that injunction order, the appointments could not be made on the post of Octroi Inspector by way of direct recruitment although the selections had been held in the year 1991. The learned Counsel for the petitioner has pointed out that, that injunction order against the direct recruitment for the post of Octroi Inspector is still in force and the Suit filed by him is also pending against the direct recruitment for the post of Octroi Inspector. It is also admitted by the learned Counsel for the petitioner before this Court that the petitioner had also applied for this post of Octroi Clerk at the time when the direct recruitment was held in the year 1991, but he was not selected. He was essentially aggrieved against the selection of one Shri Kiritbhai and few others who were parties in that suit. It is also admitted by the learned Counsel for the petitioner before this Court that the respondent no.4 was not a party defendant in this suit. Be that as it may, the fact remains that the appointments on the post of Octroi Inspector could not be made by the Dabhoi Nagar Palika because of the aforesaid injunction order passed by the Civil Court for number of years and ultimately, in the year 1996, the Selection Committee of Dabhoi Nagar Palika considered the question to make appointment on the post of Octroi Inspector by way of promotion, as was suggested by the Chief Officer of Dabhoi Nagar Palika and as was demanded by the Employees Association of Dabhoi Nagar Palika. The Selection

Committee considered the facts relating to the litigation which had taken place in this regard and found that one Shri Kiritbhai Patel who had been selected in the direct recruitment had resigned and further that the next candidate was the respondent no.4 in the select list of direct recruits. The Chief Officer had also opined that while holding the charge of Octroi Inspector, the work of the respondent no.4 had been satisfactory and further that the respondent no.4 had requisite qualifications and experience for the post of Octroi Inspector and whereas the matter challenging the direct recruitment was subjudice, conditional promotion may be given to the respondent no.4 as Octroi Inspector. On the basis of this decision taken by the Selection Committee, the respondent no.4 was made Octroi Inspector from 20th November 1996. This Resolution was challenged by the present petitioner and the respondent no.3 Shri Pravinbhai B. Bhavsar, some busy body, before the District Collector, Baroda. The District Collector, Baroda, by his order dated 8th April/May 1997 set aside the aforesaid Resolution. The learned Counsel for the petitioner has stated that on the basis of the order passed by the Collector, on 8th April/May 1997, the petitioner was put in charge of the post of Octroi Inspector and the respondent no.4 ceased to work as Octroi Inspector from 15th May 1997. The respondent no.4 preferred a revision application before the State Government and the State Government by its order dated 27th February 1998 allowed the revision application, set aside the order of the Collector and restored the Resolution passed by the Selection Committee of Dabhoi Nagar Palika. Thereafter the respondent no.4 joined back as Octroi Inspector on 6th March 1998 in pursuance of the order of the Chief Officer dated 5th March 1998. At this juncture, the petitioner filed the present Special Civil Application on 6th March 1998 and when the matter came up before the Court on 9th March 1998, while issuing Notice, an interim order to maintain the status-quo as obtaining on that day was granted by this Court with regard to the service conditions of the petitioner. On the strength of this interim order dated 9th March 1998, the petitioner who had earlier proceeded on leave after the State Government's order dated 27th February 1998, again joined as Octroi Inspector on 10th March 1998. While the matter was pending before this Court, on 25th June 1998, an order was passed by a Bench of this Court directing the Chief Officer to prepare the seniority list after inviting objections of all concerned and to file appropriate affidavit before the Court. It appears that after the passing of the aforesaid order dated 25th June 1998 by this Court, Dabhoi Nagar Palika which had not

taken this litigation seriously earlier, warmed up and prepared the seniority list of the Octroi Clerks and in this seniority list, the name of the respondent no.4 was shown at Sr.No.13 on the basis of his date of joining as Octroi Clerk on 1.9.1981 and that of the present petitioner at Sr.No.14 on the basis of his date of joining on 10th November 1981. This final seniority list dated 6th July 1998 has also been challenged by the present petitioner in this Special Civil Application by way of amendment.

3. In the backdrop of the facts as aforesaid, the question which arises for consideration is as to whether on the post of Octroi Clerk, who should be senior, whether the petitioner or the respondent no.4 and further as to whether the appointment of the respondent no.4 as Octroi Inspector on the basis of the decision of the Selection Committee dated 20th November 1996 is valid or not. Looking to the span of arguments raised today before this Court and the pleadings which have been filed by the parties, at one stage, the Court felt inclined to issue Rule and decide the matter finally thereafter, but it was pointed out by Mr.Supehia that the respondent no.3 is not represented and, therefore, in case the Rule is issued, the service will have to be again effected on the respondent no.3 and whereas the Court finds that the respondent no.3 is only a busy body who has no direct lis with regard to the question of seniority and appointment to the post of Octroi Inspector between the petitioner vis-a-vis the respondent no.4, the Court thinks it proper to decide the matter right today, at the notice stage itself because the arguments have been advanced at length and the pleadings of the parties are complete.

4. So far as the seniority is concerned, the petitioner claims seniority over the respondent no.4 on the basis of his initial date of appointment as Octroi Clerk, i.e. 21.5.1981. It has been contended that even if the appointment given to him on 21.5.1981 had come to an end on 28th August 1981, the petitioner had continued as Octroi Clerk on the strength of the injunction order passed by the Civil Court and that even if he had been discharged on 13th October 1981 while the matter was pending before the Civil Court, he had been given the appointment as Octroi Clerk on 9th November 1981 after the withdrawal of the Special Civil Application No.4298 of 1981 and he should be treated to be continuing in employment as Octroi Clerk right from 21.5.1981. The learned Counsel for the petitioner has also referred and relied upon a certificate dated 23rd June 1998 issued by the Chief Officer in which it is mentioned that since

21.5.1981 the petitioner had been continuously working as Octroi Clerk and since 15th May 1997, he was holding the charge of the post of Octroi Inspector. In this regard, Mr.T.R.Mishra appearing for the respondent no.4 has invited the attention of this Court to the fact that the petitioner had also raised an industrial dispute and the reference was made as to whether the petitioner was entitled to all the benefits right from the date of his initial appointment, the increments and all benefits including the financial benefits and this Reference No.929 of 1983 (old), New No.512 of 1984 was decided by the Industrial Tribunal, Baroda, on 8th November 1988 and the Reference had been rejected. This order passed by the Industrial Tribunal is also there on record.

5. I have considered the submissions of both the sides in this regard and I find that apart from the decision which has been rendered by the Industrial Tribunal in the Reference against the petitioner, the very nature and the tenor of the order dated 9th November 1981 shows that the appointment which was given to the petitioner in November 1981 after the withdrawal of his earlier Special Civil Application No.4298 of 1981 was a fresh appointment. Learned Counsel for Dabhoi Nagar Palika had only stated on 5th November 1981 before the Court in Special Civil Application No.4298 of 1981 that the petitioner will be appointed as a Clerk on temporary basis, as others are appointed. It was never stated that the petitioner will be treated to be continuing in service as Octroi Clerk as if his service as Octroi Clerk had never come to an end on 28th August 1981. The terms and conditions which are contained in the order dated 9th November 1981 also show that the appointment was in the nature of a fresh appointment and there is no mention whatsoever to maintain the continuity of his service or to treat the intervening period after 28th August 1981 to 9th November 1981 as continuous. In this view of the matter, merely because the Chief Officer has issued a certificate that the petitioner has been continuing since 26th May 1981, it does not enure the benefit of continuity of the service for the period after 28th August 1981 and before 9th November 1981 in favour of the petitioner. Even if it is taken that some injunction order had been passed by the Civil Court in favour of the petitioner, the petitioner had withdrawn that suit unconditionally and had also withdrawn the Special Civil Application No.4298 of 1981 on 5th November 1981 and he did not contest at that time that he should be treated to be continuing in service and should be entitled to all the benefits for the intervening period. In such a situation, while issuing the seniority list, if Dabhoi

Nagar Palika has taken the date of appointment as Octroi Clerk on 10th November 1981 and that of the petitioner as 1st September 1981 and on that basis if the respondent no.4 has been treated to be senior to the petitioner as Octroi Clerk, no exception can be taken against it. It is not a case of continuous officiation without interruption. The fact remains that the petitioner's appointment as Octroi Clerk has suffered a snap after 28th August 1981. The continuous service on the basis of an injunction order for some time, that is, till 12th October 1981 and that too when the Suit was ultimately withdrawn and even the Special Civil Application was withdrawn on 5th November without pressing the claim for the continuity and the very fact that the order dated 9th November 1981 was accepted by the petitioner and he joined on 10th November 1981, the petitioner now cannot take a turn about and say that his date of appointment should be taken as 21.5.1981 and on that basis he should be taken to be senior to the respondent no.4 who was appointed on 1st September 1981.

6. The learned Counsel for the petitioner further argued that while he is exempted from passing the departmental examination, the respondent no.4 did not pass the required departmental examination and, therefore, his continuous service as Octroi Clerk without passing the departmental examination is irregular and the holder of irregular appointment cannot be placed senior to him. Besides the fact that it is a case of collateral challenge to the continuous service of the respondent no.4 as Octroi Clerk on the ground that he has not passed the required departmental examination, the Court finds it as an admitted fact stated by the respondent no.4 and not controverted by Dabhoi Nagar Palika that after the appointment of the respondent no.4, no departmental examination whatsoever was held for the post of Octroi Clerk. True it is that the relevant Rules do provide that a person appointed as Octroi Clerk has to pass the departmental examination within one year, failing which his increment shall be withheld and in case he fails to pass this required departmental examination in three chances within a period of four years, his services shall be terminated, however, the Rules have to be applied on the facts as they stand. The fact is that no chance whatsoever was given to the respondent no.4 for passing the departmental examination as no departmental examination was held. Assuming without admitting it to be a case of breach of Rule, the breach of Rule is by Dabhoi Nagar Palika itself and not by the respondent no.4 inasmuch as the Nagar Palika itself did not hold any examination. Unless a departmental examination is

conducted, the appointee has no chance to pass the same and the fact remains that the departmental examination was not held for all the period ever since the appointment of the respondent no.4 in the year 1981, the respondent Nagar Palika has allowed the respondent no.4 to continue as such as it could not have pressed the requirement of passing the departmental examination against the respondent no.4 without holding the same. In such a situation, when it was impossible for the respondent no.4 to pass his departmental examination, his appointment as Octroi Clerk cannot be said to be irregular and on that basis, he cannot be left to suffer any prejudice either in the matter of appointment as Octroi Clerk or in the matter of his claim with regard to the seniority as Octroi Clerk from 1st September 1981. Thus, this Court finds that so far as the assignment of the seniority to the respondent no.4 over the petitioner is concerned, no exception can be taken and the respondent Nagar Palika has rightly placed the respondent no.4 above the petitioner in the seniority list which has been issued on 6th July 1998 after this Court's order dated 25th June 1998.

7. The next question is with regard to the appointment and continuance on the post of Octroi Inspector. So far as this post of Octroi Inspector is concerned, it is also an admitted position that the direct recruitment was held in the year 1991 and the appointment in pursuance of that direct recruitment could not be made because of the injunction orders passed by the Court, in this direct recruitment, the petitioner appeared, but was not selected. The person who was selected in the direct recruitment in the year 1991 and who was above the respondent no.4 had already resigned. The Civil Suit which had been filed by the petitioner challenging the direct recruitment was the Suit in which the present respondent no.4 was not a defendant. The post of Octroi Inspector was lying vacant for a long period and in such a situation, when Dabhoi Nagar Palika took a decision on the facts stated hereinabove to accord conditional promotion on the post of Octroi Inspector to the respondent no.4 keeping in view his qualifications, experience and performance while he was holding the charge of the Octroi Inspector, while the Civil Suit challenging the same is yet pending, it cannot be said that the decision of the Selection Committee of Dabhoi Nagar Palika according promotion to the respondent no.4 was either illegal or wrong or uncalled for. The fact-situation with which the Nagar Palika was faced on account of the multiplicity of the proceedings initiated and continued by the petitioner and the fact that the



post of Octroi Inspector was lying vacant despite the select list of the direct recruitment, the Selection Committee of the Nagar Palika could certainly take a decision to fill up the post of Octroi Inspector for the time being till the matter is decided by the Civil Court where the same was pending for number of years. In doing so, the Selection Committee had given due regard to the select list which had been prepared in the year 1991 whereat the respondent no.4 had been selected and had also given due regard to his qualifications and experience which were possessed by the respondent no.4 for the post of Octroi Inspector in accordance with the Rules. Further this decision of the Selection Committee had also been upheld by the State Government and the order passed by the Collector had been reversed. In this context, the main challenge of the petitioner to the Selection Committee's decision dated 20th November 1996 is that the promotion had been given to the respondent no.4 as Octroi Inspector without considering the cases of the other persons including that of the petitioner. It may be pointed out that in the facts and circumstances of this case, the Nagar Palika was faced with a very strange and novel situation in which the question of appointment by direct recruitment to the post of Octroi Inspector had been made a subject matter of multiplicity of legal proceedings and at that time the seniority of the Octroi Clerks had also not been decided and it is not a case in which the Selection Committee had undertaken an exercise for according regular or ad-hoc promotions, it was a Selection Committee in the nature of holding a special selection to meet an unusual situation as to how to fill up the post of Octroi Inspector in face of the litigation. New problems call for new solutions. It had rightly considered that when a select list which had been prepared at the time of direct recruitment was there, instead of undertaking a detailed exercise to consider the question of according promotions, it was only desirous to pull on the work and to fill up the post of Octroi Inspector till the matters are decided by the Civil Court, and therefore, it considered the respondent no.4 to be suitable on the basis of his selection in the direct recruitment whereat the petitioner had not been selected and thus, this Court does not find that the Selection Committee committed any illegality or that it has denied the right of consideration to any one. It may be observed that so far as the competing claims of the petitioner and the respondent no.4 are concerned, both of them have faced a simultaneous consideration of their competing claims at the time of direct recruitment in the year 1991 and merely because that select list has been taken into account while considering the question of

filling up the post of Octroi Inspector for the time being, the petitioner who had not been selected at that time, cannot make a grievance that the order has been passed without considering the claims of the others. None of the considerations which has been taken into account by the Selection Committee can be said to be extraneous or not germane and it also cannot be said that the right of consideration has been denied to any one for the limited purpose because the purpose was very limited to pull on the work and to fill up the post for the time being.

8. On the basis of the adjudication as aforesaid, this Court does not find any infirmity either in the higher seniority assigned to the respondent no.4 as Octroi Clerk or in the decision of the Selection Committee of Dabhoi Nagar Palika dated 20th November 1996 in filling up the post of Octroi Inspector for the time being till the final decision of the Suit which is pending against the challenge to the direct recruitment to which the respondent no.4 was not a party. Consequently, this Court does not find any substance in this Special Civil Application. The same is hereby dismissed. Ad-interim order dated 9th March 1998 automatically comes to an end and the position of the respondent no.4 as Octroi Inspector as he was holding on the basis of the decision of the Selection Committee dated 20th November 1996 has to be restored and the petitioner shall cease to be the Octroi Inspector, henceforth. Notice is hereby discharged.

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